

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

williams
PL-I/3

FILE:

B-220295.2

DATE:

February 13, 1986

MATTER OF:

Washington Health Services, Ltd.

DIGEST:

1. Protest filed after the closing date for receipt of proposals, that solicitation requirement for nursing supervisor unduly favors the incumbent contractor is untimely since it concerns a defect apparent on the face of the solicitation and should have been filed prior to closing.
2. Where solicitation clearly states the value of all the evaluation criteria, protest against the relative weight given to two of these criteria is untimely when filed after the date for receipt of proposals.
3. Where record indicates that evaluation of protester's proposal was in accordance with established criteria set forth in solicitation and the evaluation was reasonable, protest based on offeror's disagreement with the evaluation is without merit.
4. In negotiated procurement there is no requirement that award be made on the basis of the lowest cost. The procuring agency has the discretion to select a higher rated technical proposal instead of a lower rated, lower cost proposal if doing so is consistent with the evaluation scheme in the solicitation.
5. Authority to determine which documents should be released to a protester is vested in the contracting agency.
6. Allegation that procuring agency rewrote procurement records after the fact and, in response to protest, provided false and misleading information to justify its position is denied as merely speculative where not supported by any evidence of record.

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Washington Health Services, Ltd. (WHS) protests the rejection of its proposal under request for proposals (RFP) No. 50-SAAA-6-01060, issued by the United States Department of Commerce (Commerce). Commerce determined that the protester's proposal was not under consideration for award after the submission of best and final offers. WHS contends that the agency erred and argues that it is the lowest priced, technically superior offeror, who should be awarded the contract.

For the reasons stated below, we dismiss the protest in part and deny it in part.

The solicitation contemplated a fixed price contract with reimbursable items for professional health care services at 10 health units located within the Metropolitan Washington, D.C. area. The RFP stated that in considering proposals for negotiation and award, technical quality would be given greater priority than cost, and it set forth the following criteria (along with their relative weights) against which technical proposals would be evaluated:

<u>Criteria</u>	<u>Points</u>
1. Staffing Plan	30
2. Management Capability	30
3. Cost	20
4. Experience	20

Nine proposals were received by the July 15, 1985, closing date and were evaluated by the agency's technical evaluation committee. The committee found four proposals to be technically acceptable and it recommended that these four offerors be included in the technical competitive range. Of those four offers, WHS had the lowest initial technical score. The contracting officer accepted the committee's recommendation and commenced negotiations with these offerors. The agency sent written questions to three of the four offerors in the technical competitive range concerning both technical and cost aspects of their proposals. All four offerors were asked for and responded with best and final offers.

After receipt of best and final offers, including the offerors' responses to the negotiation questions, the

proposals were reevaluated and the technical scores of two firms, including WHS, were increased. Although the protester improved its position to third-ranked technically, the scores indicated that the highest ranked proposal was considerably superior to the other three, which were then rejected.

WHS objects to the rejection of its proposal and disagrees with Commerce's evaluation. In this regard, the protester contends: (1) that the RFP requirement for a nurse supervisor was biased in favor of the incumbent contractor; (2) its alternate proposal to eliminate the nurse supervisor position was not properly evaluated; (3) the agency's rejection of the protester's alternate proposal was improper; (4) its proposal was not properly read nor given the correct evaluation; (5) the evaluation factor "experience" was weighted too much; (6) WHS was not given sufficient credit for one of its key personnel; (7) not enough weight was given to the evaluation factor "cost"; and (8) Commerce did not comply with its own regulation regarding award to women-owned firms.

As a preliminary matter, Commerce argues that to the extent WHS is challenging the RFP's requirement for a nurse supervisor and the evaluation scheme that was set forth in the RFP, WHS' protest is untimely. We agree. Under our Bid Protest Regulations, a protest alleging an impropriety apparent on the face of an RFP must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1985). WHS' protest that the RFP's requirement for a nurse supervisor favors the incumbent contractor and others to its prejudice concerns an impropriety which was apparent from the face of the RFP. See Corvus Systems, Inc., B-211082.3, Feb. 11, 1985, 85-1 CPD ¶ 173 at 5. Similarly, the evaluation method--and the relative importance of experience and cost in the evaluation scheme--were apparent on the face of the solicitation. Id. Since the closing date for receipt of proposals was July 15, 1985, and WHS did not file its protest until October 9, 1985, these bases of protest are untimely and will not be considered on the merits.

At the outset, WHS complains that it has not been provided certain technical evaluation materials that Commerce considers privileged information and asks that we

release those documents to WHS. Contending that germane information has been withheld by Commerce, WHS asks this Office to conduct a thorough investigation of this procurement to determine whether selection of the proposed awardee is in the public interest. In this regard, WHS alleges that false and misleading information was given to our Office in a sworn statement by a procurement official; that the evaluation committee was biased in favor of the proposed awardee and that the failure of the procurement officials to fully comply with procurement regulations would result in "significantly higher health care costs for the U.S. taxpayers."

The authority to determine what documents should be released to a protester is vested in the contracting agencies, not this Office. See 31 U.S.C.A. § 3553(f) (West Supp. 1985); Joseph L. De Clerk & Associates, Inc., B-220142, Nov. 19, 1985, 85-2 CPD ¶567 at 3.

However, based upon our in camera review of WHS' proposals and all pertinent evaluation documents, we conclude that Commerce's evaluation had a reasonable basis and was in conformity with the evaluation provisions of the solicitation. We have no basis, therefore, to object to the contracting officer's decision to remove the protester's proposal from consideration for award.

One of the performance requirements listed in the RFP was that "each health unit must open on time, with minimum staff." For the Main Commerce Building, the "minimum staff" was one registered nurse supervisor plus three registered nurses. The nurse supervisor is responsible for the supervision of the nursing staff at all the sites. Since the president of WHS is a registered nurse, the company proposed as an alternate approach the elimination of the nurse supervisor position, at some cost savings, with the company's president providing "first-hand supervision of the nurses in all of the health units." A principal contention of the protester is that the agency did not give sufficient weight to the advantages of its alternate approach.

In challenging the propriety of Commerce's technical evaluation of its alternate proposal which eliminated the nurse supervisor position, WHS contends that this proposal was essentially "ignored" by the agency. In support of this position, WHS points to the fact that a best and final offer was only requested for the proposal which included the nurse supervisor position. The protester maintains that Commerce improperly rejected this proposal which was, in its view, "clearly the most advantageous offer."

Commerce replies that it rejected the protester's alternate proposal because the agency determined that the nurse supervisor position was necessary to fulfill the minimum needs of the government for quality health care services. According to Commerce, a full-time nurse supervisor, located at the Main Commerce Health Unit, would be responsible for contract administration and delivery of effective health care services. More specifically, Commerce states that this requirement is necessary to provide direct on site availability of this individual to the contracting officer's technical representative as well as on site supervision of at least 13 nurses. Additionally, the agency points out that having a full-time nursing supervisor at the Main Commerce Health Unit would provide a back-up nurse for the unit in the event that the other nurses are needed for an emergency or are otherwise occupied.

We have not been persuaded by the protester's submissions that these concerns of the agency are not well-founded and we therefore conclude that it was not unreasonable for Commerce to insist upon the provision of a full-time nursing supervisor. With regard to the cost savings that acceptance of the protester's alternate proposal would allegedly achieve, we note that there is no requirement in a negotiated procurement that award be made on the basis of lowest price or cost to the government. Blurton, Banks & Associates, Inc., B-211702, Oct. 12, 1983, 83-2 CPD ¶ 454. The procuring agency has the discretion to select a more highly rated technical proposal if doing so is in the government's best interests and is consistent with the evaluation scheme set forth in the solicitation. Electronic Data Systems Federal Corp., B-207311, Mar. 16, 1983, 83-1 CPD ¶ 264. As we noted above, the solicitation here allocated 80 percent of the available point score to technical criteria and only 20 percent to cost.

Here, WHS' price for its alternate proposal was low but it contemplated elimination of a requirement the agency reasonably deemed necessary. We have no basis therefore to object to the agency's rejection of the protester's alternate proposal.

WHS also challenges the overall rating it received for its technical proposal, alleging that it submitted a proposal superior to all others in the area of staffing and management. The protester claims that it is uniquely qualified to operate the employee health units because it is

the most experienced occupational health company in the local area. In support of its contention that it is better qualified, WHS points out that its nurses and health unit physicians have extensive occupational health training and experience; that its corporate president is an occupational health nurse with years of experience in the field plus management experience in health unit operations; and, its corporate medical administrator has demonstrated health unit management experience inasmuch as he co-founded and actively managed the incumbent health unit contractor from 1975 until 1983.

In reviewing WHS' claim that the professional and managerial expertise of its key personnel should have been accorded more weight in the areas of management capability and experience, we find nothing in the record that shows the rating received for these two criteria was unreasonable. For example, the protester states in its protest letter that it was recently awarded a contract to operate a health unit at another government agency. At the time WHS submitted its proposal in response to this solicitation, however, it had never operated a health unit for a government agency. With respect to the prior individual achievements of WHS' corporate medical administrator, we note that there is no requirement that an agency give credit for the accomplishments of an individual which were achieved during his association with another firm. See Airtronix, Inc., B-217087, Mar. 25, 1985, 85-1 CPD ¶ 345 at 5.

WHS next alleges that Commerce violated one of its own procurement regulations governing women-owned small businesses. Specifically, the protester states that the agency "ignored" the Federal Acquisition Regulation (FAR) provision entitled "Utilization of Women-Owned Small Businesses" which states in relevant part:

"(b) It is the policy of the United States that women-owned small businesses shall have the maximum practicable opportunity to participate in performing contracts awarded by any Federal agency." 48 C.F.R. § 52.219-13(b) (1984).

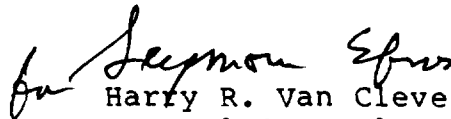
The protester asserts that by failing to select either of its proposals Commerce did not comply with the policy articulated in the cited regulation. The agency notes, however, that the cited provision is a required contract clause to encourage the use of women-owned small businesses in subcontracting. See FAR, 48 C.F.R. § 19.902. Since the referenced provision is not applicable to the issue at hand

we need not consider WHS' allegation further. We do note that we are not aware of any requirement that women-owned businesses be given special "credit" in the evaluation for award, as the protester suggests.

WHS also alleges that the technical evaluation panel members were not competent to evaluate the technical proposals stating that the "individuals involved have not demonstrated any particular competency in occupational health matters." However, the composition of a technical evaluation panel is within the discretion of the contracting agency and we will not review the qualifications of panel members in the absence of a showing of fraud, bad faith or conflict of interest. Martin Marietta Data Systems et al., B-216310, et al., Aug. 26, 1985, 85-2 CPD ¶ 228 at 8. WHS has made no such showing and we have no basis upon which to consider the matter further.

Finally, WHS alleges that certain agency officials provided false, misleading and conflicting statements to our Office in order to "disguise and hide the mishandling of the award." WHS further alleges that the individuals involved in the technical review "wrote or rewrote the record after the selection was made, in an attempt to influence GAO's opinion on any protest." Close scrutiny of the record leads us to conclude that there is absolutely no evidence in the record which in any way corroborates WHS' accusations. In view of this lack of any evidence to support WHS' allegations, we consider them speculative and without merit. See Consolidated Services Inc., B-206413.3, Feb. 28, 1983, 83-1 CPD ¶ 192.

The protest is dismissed in part and denied in part.


Harry R. Van Cleve
General Counsel